

P-421/EM-93-233 ORDER REJECTING PROPOSED TARIFF

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm  
Tom Burton  
Marshall Johnson  
Cynthia A. Kitlinski  
Dee Knaak

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of Enhanced 911 Service Price  
Restructuring

ISSUE DATE: June 13, 1994

DOCKET NO. P-421/EM-93-233

ORDER REJECTING PROPOSED TARIFF

**PROCEDURAL HISTORY**

On March 26, 1993, U S West Communications, Inc. (USWC or the Company) filed a description of its restructuring of Enhanced 911 Service (E911). USWC stated that its filing was subject to Minn. Stat. § 237.63, subd. 4(a) (1992) and, as such, could become effective in 20 days. The Company stated that in an effort to be sensitive to E911 customers, it would delay implementation for 90 days to allow review of the filing.

On February 11, 1994, the Minnesota Department of Public Service (the Department) filed its Report regarding the Company's March 26, 1993 E911 filing and two other 911 filings by the Company: its proposal to add an optional automatic number identification to the basic 911 service and the introduction of a service to provide customer records (Docket No. P-421/EM-91-873) and a proposal to introduce a service to determine the station from which a 911 call was made when the station is served by a private switch (Docket No. P-421/EM-92-341).<sup>1</sup>

On February 11, 1994, USWC filed its response to the Department's February 11, 1994 Report.

On March 15, 1994, the Department filed responsive comments.

On March 16, 1994, USWC filed a supplemental reply.

---

<sup>1</sup> The Commission has issued separate Orders in these dockets. See In the Matter of Automatic Number Identification for Basic 911 and Introduction of Customer Records Service, Docket No. P-421/EM-91-873, ORDER (June 13, 1994) and In the Matter of the Introduction of Private Switch/Automatic Location Identification Service, Docket No. P-421/EM-92-341, ORDER (June 13, 1994).

On March 23, 1994, James Brekken, Executive Director of the Metropolitan 911 Telephone Board (Metro 911 Board) filed a letter commenting on USWC's March 16, 1994 supplemental reply.

On May 18, 1994, the Metro 911 Board filed a letter commenting on a memo prepared by Commission Counsel regarding the Commission's authority to provide for limitation of utility liability and indemnification.

On May 24, 1994, the Commission met to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **A. Background**

USWC's Enhanced Universal Emergency Number Service, also referred to as Enhanced 911 Service or E911, delivers 911 calls to one or more Public Safety Answering Points (PSAPs) designated by the customer. E911 Service includes lines and equipment within USWC's service territory which can be connected to lines and equipment in independent local exchange company (ILEC) territory to permit delivery and transfer of calls placed by persons within the ILEC service area and the USWC service area who dial 911. The larger urbanized areas of Minnesota have E911 service.

USWC currently offers E911 as a totally bundled service consisting of four elements: transport, Automatic Location Information (ALI) which provides the caller's name and address to the PSAP, Automatic Number Identification (ANI) which provides the caller's telephone number to the PSAP, and Selective Routing which routes the call to the correct PSAP.

### **B. Unbundling E911**

In its filing, USWC proposed to restructure the marketing of E911 in a way that it stated would unbundle the elements of that service. Specifically, the Company proposed to separate the transport element from the other features while maintaining the same total rate. According to the Company, this would unbundle the service and allow customers to choose the features they want to purchase and allow them to choose from a range of providers.

The Department objected that the Company's filing achieves the objective of price separation, but fails to achieve a functional unbundling of E911. The Department noted that customers receive no additional ability to choose from among the E911 features (ANI, ALI, SR) because this choice is fully present under the current tariff. Moreover, since USWC's transport is required for the Company's features, no unbundling actually occurs.

### *Commission Analysis and Action*

The Commission supports the concept of USWC unbundling its E911 services. Due to the increased number of alternatives to USWC-provided transport, there is a reasonable possibility that unbundling will allow a customer to buy different sets of features from various providers to develop a high quality 911 system at a lower cost.

The Commission will not approve this filing, however. Simply stated, it does not unbundle the E911 service. It merely creates an ephemeral separation of prices for components which must/will be purchased together.

Rejecting this filing is intended to encourage USWC to develop a proposal which accomplishes

functional unbundling. The Company has agreed to refile a revised E911 filing later this year. The Company is encouraged to discuss this issue in the on-going study group process.<sup>2</sup> If the Company has not filed a restructured E911 tariff by November 18, 1994, it will be required to report to the Commission on the progress of the 911 study group and the status of USWC's efforts to restructure E911.

### **C. Liability Statement**

As part of its proposed tariff, USWC included a paragraph which sought to limit the Company's liability in the provision of E911 service under *any* circumstances to \$50.00 or an amount equivalent to the pro rata charges for the service affected during the period of time that the service was fully or partially inoperative.

The Department noted that the proposed language was quite broad and would limit the utility's liability for gross negligence or intentional acts. The Department argued that legal precedent suggests that tariffs which purport to relieve a utility from liability under such circumstances (gross negligence or willful or wanton acts) will likely be found to violate public policy. The Department recommended that USWC be allowed to limit its liability only for ordinary negligence, not for gross negligence or intentional acts.

#### *Commission Analysis and Action*

In exercise of its authority to set just and reasonable rates of telephone companies, the Commission has reviewed the Company's proposed limitation on liability and found that it is excessive. The Commission specifically rejects the portion of the proposal which purports to limit the Company's liability in circumstances where it has acted intentionally or with gross negligence.

The Commission, however, will approve the following amended tariff language limiting the Company's liability in connection with its E911 service:

---

<sup>2</sup> The study group consists of representatives of the Company, the Department, the Attorney General's Office, the Metropolitan 911 Board, the Minnesota 9-1-1 Project, various Sheriffs departments, various equipment suppliers, various county agencies with 911 responsibility, and the Minnesota Telephone Association (MTA). The group has already met twice to discuss the unbundling of 911 services.

The Company's liability for any loss or damage arising from errors, interruptions, defects, failures, or malfunctions of this service or any part thereof ~~whether~~ caused by the negligence of the Company ~~or otherwise~~ shall not exceed the greater of \$50.00 or an amount equivalent to the pro rata charges for the service affected during the period of time that the service was fully or partially inoperative. These limited damages shall be in addition to any credit which may be given for an out-of-service condition as specified in the General Rules and Regulations.<sup>3</sup>

#### **D. Indemnification Clauses**

The Company-proposed tariff contains two indemnification clauses. Indemnification differs from limitation of liability in that it does not block recovery by an injured party but shifts the burden of defending against damage claims and paying any damages awarded the injured party.

The Company's first indemnification clause requires the customer to agree to indemnify USWC from claims due to the customer's acts or omissions. The second paragraph is more specific in its focus; it requires the E911 customer to indemnify the Company for any invasion of privacy caused or alleged to be caused by the customer's use of the E911 service.

The Department and the Metro 911 Board objected that the paragraphs were one-sided in that they provided indemnification of the Company from acts of customers but did not indemnify customers for acts of the Company. The parties argued that reciprocal language was required in order for indemnification to be fair.

#### *Commission Analysis*

Provision of 911 service is a high risk public service. The Commission, as the regulator of telephone service in the state, appropriately examines what risks the utility and its rate payers should assume with respect to that activity. The justification for allowing the Company to switch the burden of responding to law suits resulting from the negligence of an individual customer to that customer stands alone and does not require reciprocal indemnification of customers for its validity. The justification for indemnifying the Company is to facilitate equity in the provision of 911 service by limiting the risks that the utility and its ratepayers will be required to assume in the provision of this important public service.

The rationale for requiring the utility to indemnify the customer, on the other hand, is much less compelling. The Department and the Metro 199 Board advanced no argument other than that "reciprocity" required it. However, the public interest status of the utility (and its ratepayers) vis a vis the service is different enough from that of a 911 customer that a simple claim for reciprocity is unavailing.

#### *Commission Action*

Accordingly, the Commission will approve the Company's proposed indemnification clauses as proposed. In so doing, the Commission clarifies that the Company will be indemnified only for the acts of the 911 customer, not for acts of its own employees.

Finally, the Metro 911 Board expressed concern about language in a memo from the Commission Counsel which, according to the Board, could be interpreted as referring to counties as the sole customers of the Company's E911 service. The Board pointed out that other units of government also contract and pay for 911 service. The Board wished the issue of who is the

---

<sup>3</sup> The editing marks indicate the changes the Commission is making in the language originally proposed by the Company.

"customer" of the 911 service to be left open at this time. The Commission agrees generally that the issue may bear further development and trusts that it will be so developed in a proceeding where that issue is relevant to what the Commission is called to decide. In the meantime, the Commission clarifies that nothing in this Order speaks definitively on that issue.

### **ORDER**

1. The Company's E911 filing in this docket is denied.
2. If the Company has not filed a restructured E911 tariff by November 18, 1994, the Company shall report to the Commission regarding the progress of the 911 study group and the status of USWC's efforts in the restructuring of E911.

3. The following limitation of liability language is approved:

The Company's liability for any loss or damage arising from errors, interruptions, defects, failures, or malfunctions of this service or any part thereof caused by the negligence of the Company shall not exceed the greater of \$50.00 or an amount equivalent to the pro rata charges for the service affected during the period of time that the service was fully or partially inoperative. These limited damages shall be in addition to any credit which may be given for an out-of-service condition as specified in the General Rules and Regulations.

4. The following indemnification clause language is approved:

The E911 customer agrees to release, indemnify, defend and save harmless the Company from claims, suits, actions, damages, costs, judgments and actions of every name and description arising out of or due to acts or omissions of the E911 Customer, its agents and its employees while answering and dispatching 911 calls.

The E911 customer agrees to indemnify and hold harmless the Company for any infringement or invasion of the right of privacy of person or persons, caused or claimed to be caused by the acts or omissions of the customer and their operation or use of the E911 service.

5. The Company's E911 tariff shall include the limitation of liability and indemnity clause language approved in this Order.
6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)